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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LAWRENCE REICHELT,

Plaintiff and Appellant,

v.

WILLIAM JAMES KOONTZ,

Defendant and Respondent.

B210201

(Los Angeles County
Super. Ct. No. LC078262

APPEAL from an order of the Superior Court of Los Angeles County,
Bert Glennon, Jr., Judge. Affirmed.

Lawrence Reichelt, in pro. per., for Plaintiff and Appellant.

McNamara & Associates and Thomas F. McNamara; William James Koontz &
Associates and William James Koontz for Defendant and Respondent.

In this appeal, plaintiff Lawrence Reichelt (plaintiff) challenges an order that dismissed his case against William J. Koontz (defendant) after a demurrer by defendant to plaintiff's second amended complaint was sustained without leave to amend. Plaintiff asserts sustaining the demurrer amounted to an abuse of the trial court's discretion. Plaintiff also asserts error with respect to a discovery issue, and abuse of discretion with respect to a continuance of a mandatory settlement conference. Our review of the record convinces us there is no cause to reverse the order of dismissal.

BACKGROUND OF THE CASE

1. Overview

According to plaintiff's initial complaint in this case (complaint), plaintiff retained an attorney by the name of Mark Geyer (Geyer) to file a personal injury suit on his behalf (*the first suit*), and due to Geyer's professional negligence, the suit was dismissed and Geyer fraudulently told plaintiff that the suit could be revived. Then plaintiff retained defendant to file a negligence suit against Geyer based on Geyer's malpractice (*the second suit*). The second suit (for professional malpractice and fraud (concealment of the dismissal of the first suit and failure to move for reinstatement of the first suit) was filed in June 2003 and named as defendants both Geyer and the Geyer Family Trust. Plaintiff received a default judgment against both Geyer and the Geyer Family Trust in the amount of \$50,525 for Geyer's malpractice and fraud.

The complaint alleges that thereafter, plaintiff and defendant became aware that Geyer had fraudulently transferred assets out of the family trust and to Geyer's wife, and

so defendant filed suit to have the transfer set aside (*the third suit*).¹ The third suit was filed in September 2004. During the time the third suit was pending, defendant was served with Geyer's chapter 7 bankruptcy filing papers.² Although defendant promised plaintiff that he would file a complaint with the bankruptcy court to determine the dischargeability of plaintiff's judgment against Geyer, defendant failed to do so and the result was that Geyer's debt to plaintiff was discharged in bankruptcy. In contrast, there was a similar case in which an attorney did file a complaint to determine dischargeability of debt and the attorney prevailed.

According to the complaint, defendant began billing plaintiff for costs, which was in violation of their written retainer agreement, and plaintiff had no money to pay defendant. Defendant filed a motion to be relieved as counsel in the third suit and the motion was denied. Plaintiff directed defendant to dismiss the third suit. Defendant refused to dismiss it and filed a second motion to be relieved as attorney of record in that suit. This time, on June 20, 2006, the court granted defendant's motion to be relieved as counsel in the third suit, and pursuant to plaintiff's request, the court also dismissed the third suit. As it happens, plaintiff was not the only plaintiff in the third lawsuit. There

¹ Named as defendants in the third suit were Geyer, his wife, his son, and the Geyer Family Trust. Defendant filed a lis pendens on real property in that case.

² Geyer's bankruptcy papers listed the United States government as a creditor, specifically \$508,000 in federal income taxes. There is no indication that debt could be discharged.

was a second plaintiff, Betty Karp (Karp), and she prevailed on the cause of action for Geyer's fraudulent transfer of assets.³

The complaint alleges defendant failed to exercise reasonable care in preserving plaintiff's judgment against Geyer in the second suit when defendant handled that case, and defendant thereby caused plaintiff to lose the benefits of the judgment against Geyer. The complaint alleges causes of action for professional negligence and fraud. Defendant demurred to both causes of action and the demurrer was sustained with leave to amend.

2. *Plaintiff's Amended Complaints in the Instant Action*

a. *First Amended Complaint*

Plaintiff filed a first amended complaint in which he re-alleged causes of action for professional negligence and fraud, and added causes of action for infliction of emotional distress, breach of contract and general negligence. Defendant's demurrer to the new causes of action was sustained without leave to amend because the court had not granted leave to add new causes of action.

The demurrer to plaintiff's original causes of action was sustained with leave. The court stated: "there aren't allegations of facts that allege that the plaintiff would have prevailed in the bankruptcy action, and even if he had prevailed, whether or not the debt would be collectable and whether there are facts that indicate that there would have been

³ The record shows that defendant represented Karp in a suit against Geyer and the law offices of Geyer, and Karp received a judgment of \$14,490 in that suit. In the third suit, in which Karp was a plaintiff along with plaintiff, a structured settlement was reached on Karp's behalf.

a, quote, unquote, ‘better result,’ as set forth in [the] Magna vs. Campbell case.

[¶] . . . The allegations are general. I think they have to be specific.”

b. *Second Amended Complaint*

In plaintiff’s second and final amended complaint he re-alleged what prompted the filing of the second and third suits, and that during the time the third suit was pending, Geyer filed for bankruptcy protection under chapter seven. The second amended complaint alleges that a section 341 hearing was held in the bankruptcy case for examination of Geyer as to Geyer’s assets and transfers of assets, the hearing was held on January 24, 2005, and notice of the hearing was given to plaintiff in care of defendant, but defendant did not give plaintiff notice of the hearing until February 14, 2005, which was too late to enable plaintiff to attend the hearing and examine Geyer under oath regarding Geyer’s assets and transfers of assets.⁴ Then, based on defendant’s representations to plaintiff that Geyer had engaged in a fraudulent transfer of real estate to hinder, delay or defraud Geyer’s creditors, “a complaint” was filed with the bankruptcy trustee and fraud unit at the end of February 2005 and on March 28, 2008, the trustee filed a “withdrawal of report of trustee in chapter 7 no asset case.”⁵ Plaintiff re-alleges that he “noticed [defendant]” with the “complaint to determine the dischargeability and denial of discharge” that was used by an attorney to preserve a malpractice and fraud judgment similar to the judgment plaintiff had obtained against

⁴ After alleging that he did not attend the hearing, plaintiff did not add that defendant also did not attend the hearing and examine Geyer on those matters.

⁵ Plaintiff does not allege whether he, defendant or someone else filed that complaint.

Geyer that Geyer sought to discharge, and defendant promised plaintiff that he would file such a complaint because Geyer was attempting to discharge the second suit judgment that was based on Geyer's fraud. However, defendant had no intention of filing the complaint and never filed it.

The second amended complaint alleges that on March 21, 2005, defendant filed a "special notice" with the bankruptcy court and on April 14, 2005, the bankruptcy trustee filed an application to employ a certain law firm as general counsel and listed as a purpose of such employment the goal of making a determination whether there had been a fraudulent transfer of assets involving the Geyer Family Trust for the purpose of hindering, delaying or defrauding any creditor. By order dated May 4, 2005, the trustee was authorized to employ that law firm and the order "called for the production of documents inclusive of tax returns, bank statements, all real estate transactions, escrow information, [and] trust information along with many other categories of financial documents." A production of documents and an examination of Geyer and his wife, in their individual capacities and as trustees of the Geyer Family Trust, was ordered and according to the trustee's July 29, 2006 report, no fraudulent transfer of assets was identified after that investigation.⁶ By court order on August 1, 2005, the bankruptcy case was concluded.

⁶ Essentially, the trustee's report states the trustee made a diligent investigation into the whereabouts of property belonging to the bankruptcy estate, the trustee has no objections to the exemptions claimed, and Geyer's unexempt assets are "burdensome or of inconsequential value or are encumbered beyond value and the Trustee asserts no interest therein." The trustee's report further states the trustee did not take possession of the unexempt assets and would not administer them.

The second amended complaint alleges that without telling plaintiff that the bankruptcy case was closed and without telling plaintiff that the bankruptcy investigation cleared Geyer, his wife and son and family trust of making fraudulent transfers, defendant billed plaintiff for costs and plaintiff refused to pay costs that defendant had agreed to pay pursuant to their retainer agreement. Further, defendant twice received discovery from Geyer's attorney in the third case without telling plaintiff and Geyer requested sanctions from plaintiff. Defendant sought to be relieved as plaintiff's record in the third case, and the court denied that request and ordered defendant to serve plaintiff with discovery. When plaintiff reviewed the discovery he realized that Geyer had not engaged in fraudulent transfer of assets nor sought to hinder, delay or defraud plaintiff by transfer of real estate. The third suit was dismissed at plaintiff's request, and plaintiff "relieved [defendant] on June 20, 2006 of any further representation of [Plaintiff]."

Plaintiff alleges that by promising to file the abovementioned "complaint to determine the dischargeability and denial of discharge," knowing that the Geyer had been cleared by the trustee's investigation of fraudulent transfers involving the family trust, defendant failed to use the professional skill, prudence and diligence commonly

The report makes no findings regarding whether Geyer's transfer of an interest he had in his family home was intended to hinder, delay or defraud his creditors. Defendant asserts in his appellate brief that the transfer of interest that Geyer made in real property was made *before* the two-year period "reach back" prior to the filing of a bankruptcy case, in which period certain transfers of interest in assets made by a person filing a bankruptcy petition may be avoided by the trustee. (U.S.C. § 548(a).)

Plaintiff's and Karp's default judgments against Geyer were discharged. The bankruptcy court's "explanation of bankruptcy discharge in a chapter 7 case" information sheet explains that although a debt is discharged, "[i]t is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors."

possessed by other attorneys and therefore defendant was the cause of plaintiff losing the benefit of the default judgment against Geyer. Defendant committed fraud by promising to file such a complaint but knew he had no intention of doing so, and by concealing from plaintiff that he did not file the complaint, and concealing from plaintiff and the court handling the third case that the bankruptcy trustee determined there was no fraudulent transfer of assets even while defendant continued to prosecute the third case. By defendant's not filing the "complaint to determine the dischargeability and denial of discharge," plaintiff lost the opportunity to have the bankruptcy court review the facts of the first case relative to Geyer's committing fraud against plaintiff in Geyer's fiduciary capacity as plaintiff's attorney so that the bankruptcy court could make a determination whether Geyer was attempting to discharge a judgment that was based on Geyer's fraud, and thereby lost his default judgment.

3. *Defendant's Demurrer to the Final Complaint*

Defendant demurred to the second amended complaint on the grounds that plaintiff cannot show that he would have prevailed in the bankruptcy action or that if he had prevailed, he would have been able to collect Geyer's judgment debt, and hence that he would have had a better result but for defendant's alleged negligence and fraud. Defendant also contended the cause of action for fraud in the second amended complaint lacked sufficient specificity and all of the alleged facts were too vague and ambiguous to support any cause of action.

At the hearing on the demurrer, plaintiff indicated to the court he was not seeking leave to amend his complaint again but he would seek leave to present newly discovered

evidence to the trial court, namely that Geyer's status as a member of the State Bar was being considered by the Bar. The court permitted Plaintiff to file the new evidence together with papers explaining the relevance of the evidence, and permitted defendant to file a response.

In his supplemental papers, plaintiff stated that Geyer's large tax debt to the federal government is not relevant to the question whether plaintiff could collect on his judgment against Geyer because if Geyer were to continue practicing law then he would have an income from which plaintiff's judgment against Geyer could be paid. Plaintiff stated that Geyer had an income of \$525,000 in the two and one-half years leading up to his filing for bankruptcy. Plaintiff stated that the purpose of his asking defendant to file the "complaint to determine the dischargeability and denial of discharge" was to maintain his judgment so that he could collect on it at a later time. He observed that judgments can be periodically renewed, but the effect of defendant's failure to file that complaint after promising plaintiff that he would file it was final. Plaintiff stated that if Geyer were to be disbarred then plaintiff would dismiss the instant case, however plaintiff's check of the State Bar's web site showed that Geyer was not disbarred but was suspended from practicing law for three years and nine months, with a five-year probation and thus Geyer will at some point have income as an attorney which could have been used to pay the judgment plaintiff has against him had defendant preserved the judgment by filing the complaint with the bankruptcy court.⁷

⁷ Defendant has requested that this court take judicial notice that Geyer resigned from the State Bar in January 2009 with charges pending. We granted the request.

When the time for the parties to submit papers on plaintiff's additional evidence expired, the trial court issued an order sustaining the demurrer without leave to amend, finding that plaintiff's damages are too speculative. The court found plaintiff failed to allege (1) he would have prevailed on the bankruptcy complaint that defendant did not file for him, (2) had he prevailed on such a bankruptcy complaint he could have collected on his default judgment against Geyer, (3) he would have obtained a better result by means of a bankruptcy complaint than he could have obtained in the third suit, the one he voluntarily dismissed, and (4) specific facts in support of his claim of false promises. Thereafter, the court dismissed this action.

Defendant has requested that this court take judicial notice that Geyer resigned from the State Bar in January 2009 with charges pending. We granted the request for judicial notice.

CONTENTIONS ON APPEAL

Plaintiff contends the court abused its discretion when it sustained the demurrer to the second amended complaint. He also asserts the court erred in a discovery ruling that resulted in monetary sanctions against him, and the court abused its discretion when it continued a mandatory settlement conference.

DISCUSSION

1. Standard of Review on Demurrers

A demurrer tests the sufficiency of the allegations in a complaint as a matter of law. (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1151.) We review the sufficiency of the challenged complaint

de novo. (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 529.) We accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also accept as true facts which may be inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We consider matters which may be judicially noticed, and we “give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.” (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) “[I]ts allegations must be liberally construed, with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.) We do not concern ourselves with whether the plaintiff will be able to prove the facts which are alleged in the complaint. (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1521.) The judgment or order of dismissal entered after the demurrer is sustained must be affirmed if any of the grounds for demurrer raised by the defendant is well taken and disposes of the complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) It is error to sustain a general demurrer if the complaint states a cause of action under any possible legal theory. (*Ibid.*)

It is an abuse of the trial court’s discretion to sustain a demurrer without leave to amend if there is a reasonable possibility the plaintiff can amend the complaint to allege a cause of action. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) To prove abuse of discretion, the plaintiff must demonstrate how the complaint can be amended. Such a showing can first be made to the reviewing court. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.) However where the plaintiff

informs the court that it will stand on the complaint and does not seek to amend it, then we determine only whether the complaint states any legally sufficient claim, not whether it can be amended to do so. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 637.)

2. *The Demurrer to the Second Amended Complaint Was Properly Sustained*

Defendant spends considerable effort in his respondent's brief arguing that plaintiff cannot plead and prove certain matters that would be necessary for him to recover against plaintiff in the instant case. However, the issue in this appeal is not what defendant *could* plead and prove. The issue is that he did not plead these matters and he stated to the trial court that he did not wish to amend his complaint. Plaintiff was required to plead the essentials of what he would have to prove in a trial.

We agree with the trial court's conclusion that plaintiff's claim of damages is "still" too speculative because plaintiff failed to allege that (1) he would have prevailed on the bankruptcy complaint that defendant did not file for him, a complaint that plaintiff argued in his supplemental papers was designed to maintain his judgment against Geyer so that he could collect on it at a later time; (2) had he prevailed on the bankruptcy complaint he could have collected on his default judgment against Geyer; (3) he would have obtained a better result by means of the bankruptcy complaint than he could have obtained in the third (fraudulent transfer of assets) suit, the one he voluntarily dismissed; and (4) specific facts in support of his claim of false promises.

Regarding the fact that plaintiff did not allege that he would have obtained a better result in collecting on his judgment had defendant filed the bankruptcy complaint than he

could have obtained in the third suit had he not dismissed it, while it is true that plaintiff alleged in his second amended complaint that he only dismissed the third suit because when he reviewed discovery from Geyer, he realized that Geyer had not engaged in fraudulent transfer of assets nor sought to hinder, delay or defraud plaintiff by transfer of real estate, this explanation ignores the fact that it was not only Geyer who was sued in the third suit. Geyer's wife, son and the family trust were also defendants in that suit and Ms. Karp, plaintiff's co-plaintiff, obtained a recovery in that suit.

Because plaintiff did not provide the court with a viable complaint, there was no possibility that he could move forward on his case. Therefore, contrary to his assertion, he has not been denied a right to a jury trial. There was nothing to try.

3. *Plaintiff Has Not Been Denied the Benefits of the Discovery Statutes*

At a hearing on March 14, 2008, the court noted that one of the matters in this case that it was to consider that day was a motion brought by plaintiff to compel discovery. The court observed that plaintiff's discovery request that was the subject of the motion to compel was *the same discovery request* that was the subject of an earlier motion to compel brought by plaintiff and heard in January 2008. The court stated it had denied that earlier motion to compel on the grounds that defendant had timely responded to the earlier discovery request. Regarding the motion to compel that it was hearing on March 14, the court observed that plaintiff had just re-served defendant with the same discovery request and "there is case law that says that you can't just set the motion and try to reset the clock by requesting exactly the same thing you requested before. . . . [¶]

So the motion [] on the discovery is denied and the monetary sanctions of eleven hundred is granted because this motion was brought without substantial justification in my view.”

Plaintiff objected to the court’s ruling, telling the court that at a status conference in “February,” plaintiff had mentioned that he “was going to file for discovery,” and the court had responded by turning to defendant and saying “just answer the questions,” and so plaintiff was “under the impression that [he] could go forward with the discovery based on the court’s statement to [defendant].” The court responded by telling plaintiff that there is a distinction between asking the same questions again and asking new questions, “and in order to stop the mutual rock throwing contest and coming back here time after time on ordinary discovery issues, I undoubtedly said: ‘Look, just answer the questions.’ But that does not mean you continue to re-ask the same questions that have already been ruled on over and over again. That you can’t do. That’s the difference.”

Plaintiff then addressed the sanctions issue and stated he could not pay sanctions and moreover there was no intent on his part to misuse discovery statutes. The court responded it was not a matter of intentionally doing something but rather of not following discovery rules. Plaintiff stated he had not read the case that the court cited to him about re-serving the same discovery, and he had only acted based on what he understood the court to mean at the status conference.

When the court reconsidered the issue of sanctions and stated it would not impose sanctions at that point, defendant’s attorney observed that the case cited by the court to plaintiff had also been cited in defendant’s opposition to the motion to compel and yet plaintiff did not take his motion to compel off calendar. Plaintiff replied that he has been

in other court cases and he knows that opposing counsel put their own interpretation on a case and therefore they often cite cases that “don’t hold up under scrutiny,” and plaintiff felt he was on solid ground based on the cases and statutes he cited. The court indicated that discovery sanctions are discretionary and sometimes there are legitimate arguments and reasonable minds can differ, and other times parties just leave motions on calendar “in hopes that something different will happen.” The court imposed the sanctions and made them payable within 20 days.

On appeal, plaintiff gives a different account of the conversation that he had with the court at the status conference. Whereas at the March 14, 2008 hearing he told the court that he had mentioned at the February status conference that he was “going to file for discovery,” now he states on appeal that he told the court at the status conference that he had asked the same questions in his discovery and filed a motion to compel, and “[w]ith both sets of discovery on file with the Court, [the] Court stated to [defendant] ‘just answer the questions’.” Plaintiff asserts on appeal that he was denied access to the discovery rights provided to him in the discovery provisions in the Code of Civil Procedure, and he was “sanctioned \$1,100 for reasons that were never fully explained to [him].”

We cannot agree with any portion of plaintiff’s argument. The whole of the reporter’s transcript for the March 14, 2008 hearing shows that the reasons for sanctions were indeed fully explained to plaintiff. Moreover, the fact that both sets of discovery were in the court’s file does not mean that the court, at the status conference, was aware of their being there, much less that the court had read them. There was no need to read

them because it was a status conference, not a discovery motion hearing involving that specific discovery. Nor are we impressed by plaintiff's revision of what was said at the status conference.

4. *There Was No Abuse of Discretion When the Court Continued the Mandatory Settlement Conference*

At that same March 14, 2008 hearing, defendant's attorney observed that a mandatory settlement conference was scheduled for that day but the case was not yet at issue. The court opined that the status of the case not being at issue had been "going on far too long" and asked if defendant had filed a demurrer to the second amended complaint. Defendant's attorney indicated it was about to be filed. The court stated there was no point in having a settlement conference since the case was not at issue and at the hearing on the demurrer, the court would consider on what date, if any, trial would be set.

On appeal, plaintiff notes that prior to the March 14 hearing he had filed a request for judicial notice, a witness list, an exhibit list, a mandatory settlement conference brief, and a request for the court to have certain case files brought to court, all for the purpose of being prepared for the settlement conference. Plaintiff states that in contrast, defendant came to court on March 14 unprepared for the settlement conference, including not having filed the documents required for a settlement conference, and not having filed an answer or a demurrer to the second amended complaint within the statutory time frame for filing them.

Plaintiff asserts that despite defendant's failure to be prepared for the settlement conference, the court on its own motion continued the settlement conference to

accommodate defendant's intention to file a demurrer, and the court justified doing so by saying there was no point in having a settlement conference if the case was not at issue and it was not at issue because there was no operative complaint. Plaintiff claims the court abused its discretion in doing that because plaintiff did have an operative complaint.

We find no abuse of discretion. Statutes in the Code of Civil Procedure set out the minimum time a defendant has to respond to a complaint before a default may be taken. Without a response (answer, demurrer) from defendant to the second amended complaint, or a default obtained by plaintiff pursuant to a request for default, there was nothing for the court to adjudicate or settle.

DISPOSITION

The order of dismissal is affirmed. Costs on appeal to defendant.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.